

This Opinion Is Not a
Precedent of the TTAB

Mailed: July 28, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Whalehead Brewery, LLC
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Application Serial No. 90741753
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London Davenport and Elizabeth B. Savage of Beer Law Center for Whalehead Brewery, LLC.

Sasha Rios, Trademark Examining Attorney, Law Office 125,
Robin Mittler, Managing Attorney.

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Before Wolfson, Pologeorgis, and Dunn, Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Whalehead Brewery, LLC (Applicant) seeks registration on the Principal Register of the mark WHALEHEAD BREWERY, in standard characters (“BREWERY” disclaimed), for “beer” in Class 32.¹

The Examining Attorney refused to register Applicant’s mark under Section 2(e)(2) of the Trademark Act, 15 U.S.C. § 1052(e)(2), on the ground that

¹ Application Serial No. 90741753 was filed on May 28, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of its bona fide intent to use the mark in commerce.

WHALEHEAD is primarily geographically descriptive of Applicant's goods. The Examining Attorney argues that "this wording references a **beach area** in Corolla, North Carolina." Examining Attorney's Brief, 8 TTABVUE 3.² (emphasis in original). "[T]he term 'WHALEHEAD' is well-known to the purchasing public as evidenced by its 'Outer Banks icon' status."³ February 11, 2022 Office Action, TSDR 1.⁴

Applicant contends that WHALEHEAD is not primarily geographically descriptive. Specifically, while acknowledging "the existence of the Whalehead Club property" in North Carolina and the beach near the club which "could be referred to as Whalehead Beach," Applicant contends that "when considered beyond local usage, the term 'Whalehead' loses any geographic meaningfulness and becomes obscure to the relevant public." Applicant's Brief, 6 TTABVUE 8.⁵

² References to the appeal refer to the Board's TTABVUE docket system. Coming before the designation TTABVUE is the docket entry number; and coming after this designation are the page references, if applicable.

³ We take judicial notice of the dictionary definition of the wording "Outer Banks" which is defined as a "chain of sand islands and peninsulas along the Atlantic coast of North Carolina" At <https://www.merriam-webster.com/dictionary/Outer%20Banks>; accessed July 26, 2023. The Board may take judicial notice of dictionary definitions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

⁴ Page references to the application record are to the USPTO's Trademark Status & Document Retrieval (TSDR) system.

⁵ Applicant does not contend that the presence of the term "brewery" in the mark affects whether the mark is primarily geographically descriptive. Accordingly, the question before us is whether "Whalehead" is primarily geographically descriptive when used on or in connection with Applicant's goods.

The Examining Attorney made the following Internet evidence of record to show that WHALEHEAD is the name of a beach, a mansion, or a club within the mansion, that is located in Corolla, North Carolina (February 11, 2022 Office Action):⁶

- Printout from Currituck County’s Welcome Center website, <https://www.visitcurrituck.com>, describing Whalehead as “a beautifully restored 1920s-era Art Nouveau-style mansion-turned-museum listed on the National Register of Historic Places.” At TSDR 4.
- Entry from Wikipedia for “Whalehead Club,” <https://en.wikipedia.org>, describing it as an historic and large “home located on a remote track facing the Currituck sound in North Carolina.” At TSDR 5.
- Printout from Paramount Destinations, Corolla NC, visitobx@paramountdestinations.com, describing Whalehead Corolla as “One of the most sought-after Outer Banks destinations.” At TSDR 2.
- Printout from the Outer Banks Guide, <https://obxguides.com>, describing “Whalehead in historic Corolla” as an “Historic Outer Banks Attraction in Corolla, NC” and “an intricate part of Currituck Heritage Park.” At TSDR 3.
- Printout from the OuterBanks.com visitors guide, <https://www.outerbanks.com>, refers to the mansion as “a northern Outer Banks icon, and a living testament to Corolla and Duck’s heyday as a secluded oceanfront retreat for the country’s wealthy hunters and conservationists.” At TSDR 6.

⁶ The probative value of Internet documents is limited to show that the statements contained therein were made or that information was reported, but not to prove the truth of the statements contained therein. Trademark Rule 2.122(e), 37 CFR § 2.122(e); *see, e.g., Swiss Watch Int’l Inc. v. Federation of the Swiss Watch Ind.*, 101 USPQ2d 1731, 1735 (TTAB 2012); *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031 (TTAB 2010).

The Examining Attorney also submitted printouts of webpages from seven property rental websites that advertise rental property at Whalehead Beach (April 6, 2022 Office Action). All but two of them have offices located in the Outer Banks:

- Twiddy – <https://www.twiddy.com> – with offices in Corolla and Duck. Two maps are included in the website; neither identifies Whalehead Beach. At TSDR 2.
- VRBO – <https://www.vrbo.com> – according to the website, there are 1,119 properties in Whalehead Beach available through VRBO. Three of the five pictured properties are indicated as being at Whalehead Beach; the other two are in Corolla Bay and Oceanside. There is a map, but it does not identify Whalehead Beach. At TSDR 3.
- Beach Realty & Construction Kitty Hawk Rentals – <https://www.beachrealtync.com> – only a toll-free number is provided; no address is listed for the company. There are two maps, neither of which shows Whalehead Beach. All six pictures of available properties are located in Corolla. At TSDR 4.
- Village Realty – <https://www.villagerealtyobx.com> – located in Nag’s Head. All 21 properties listed are identified as being located in Corolla. There is a map that does not identify Whalehead Beach specifically, but all properties are indicated by a “dot” on the map and they are clustered together in one area along the beachfront. At TSDR 5.
- Sun Realty – <https://www.sunrealtync.com> – located in Kill Devil Hills and Nag’s Head (Outer Banks). Whalehead Beach is listed under “Corolla Communities.” Describes it as a private community. At TSDR 6.
- Resort Realty – <https://www.resortrealty.com> – located in Nag’s Head. There is a picture of the sign marking the entrance to Whalehead Beach community. “Whalehead Beach, located in Corolla,

is a popular Oceanside subdivision that has large half acre lots. Whalehead Beach runs north to south for 12 blocks; each block is 12 lots long.” At TSDR 7.

- Brindley Beach Vacations & Sales – <https://www.brindleybeach.com> – offices in Corolla, Kitty Hawk, and Duck. Promotes Whalehead Beach as a private community “made up of 3 streets that run parallel to the ocean with 5 Community Beach accesses and public beach parking.” It is a “wide, inviting three-mile strand of beach.” At TSDR 8.
- Shoreline OBX Vacation Rentals – <https://shorelineobx.com> – located in Kitty Hawk. “Everything You Need To Know About the Best Things To Do In Whalehead Beach, NC.” The “favorite 3 things to do in Whalehead Beach, NC” are: visit the Currituck Beach lighthouse, spend a day on the water, go on a wild horse tour in Corolla, and “Enjoy Your Stay in a Shoreline OBX Vacation Rental.” At TSDR 9.

In response, Applicant submitted the following evidence to show that Whalehead Beach is obscure and that the Whalehead Club attracts minimal visitors in comparison to other nearby locations (February 18, 2022 Response to Office Action):

- Copies of two online news articles, both from <https://www.pilotonline.com>:
 - In 2009: “Revenue drop could endanger funding for Whalehead Club,” article stated that funding for the Whalehead Club had dropped, precipitating an expected drop in admissions and event revenues. At TSDR 17.
 - In 2011: “Whalehead Club looks to hook more visitors to N.C.,” article stated that the “Whalehead Club board and Currituck County commissioners are considering . . . [i]mprovements” to the facilities and that the hunt club and vacation home “draw[] about 17,000 [visitors] annually” whereas the

nearby lighthouse and wildlife center “each draw about 100,000.” At TSDR 11.

- 2022: Printout from the “visitwhalehead” site on Instagram, displaying 7 posts, 712 followers, and 37 following (at TSDR 24), compared with 3,887 posts, 314,000 followers and 520 following for the “biltmoreestate” site, devoted to the Biltmore estate in Asheville, NC (at TSDR 50).
- 2020: Copies of the articles “7 Most Beautiful Historic Homes to Visit in North Carolina,” <https://www.tripstodiscover.com>, (at TSDR 26-36), and (undated) “The Outer Banks Official Tourism Authority’s 10 Best Things to Do on The Outer Banks,” <https://www.outerbanks.org>, (at TSDR 46-9), neither of which include entries for Whalehead Beach.⁷

Applicant also submitted evidence from the WordSense dictionary and from en.wiktionary.org defining a “whalehead” as a type of African wading bird and as a type of sand dune in North Carolina. October 6, 2022 Request for Reconsideration, at TSDR 6-7. Applicant also submitted a webpage from Oregonhikers.org that identifies “Whalehead Island” as part of the Oregon Islands National Wildlife Refuge and the Oregon Islands Wilderness, noting that there is “no public access permitted.” *Id.* at

⁷ In its response, Applicant refers to another listing that it identifies as “Visit NC,” and states that its website address is <https://www.visitnc.com>. None of the webpages attached to the response, however, display this URL. There is one additional website for which pages are provided, and that is for the website “Tour North Carolina’s Historic Homes,” but no URL address is displayed on any of that website’s pages. *Id.* at TSDR 37-44. To the extent the URL mentioned in the response matches the webpages provided, which is unclear, we have not entirely disregarded the evidence, but accorded it minimal weight. *In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018) (to make Internet material properly of record, the offering party must provide the full address (URL) for the web page, and the date it was accessed or printed, either by the information displayed on the web page itself, or by providing this information in an Office action or an applicant’s response); *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1593 (TTAB 2018).

TSDR 10. Additionally, Applicant submitted a page from the website Audubon.org promoting “Whalehead Island NWR” in Oregon as an important birding area. *Id.* at TSDR 11.

Based on this evidence, Applicant contends that a beer purchaser outside of North Carolina would not likely use WHALEHEAD to mean the place surrounding the Whalehead Club in Corolla. “In a non-local consumer’s mind, WHALEHEAD could mean a type of bird or sand dune, be a reference to a whale’s head, be suggestive of the beach or ocean, or be entirely arbitrary.” 6 TTABVUE 9. The Examining Attorney maintains that “it is clear from the record that the most prominent meaning or significance of the mark is geographic for the applied-for goods since Applicant is located within Corolla, North Carolina.” Examining Attorney’s Brief, 8 TTABVUE 8.

I. Discussion

The elements for proving that a mark is primarily geographically descriptive are:

- (1) The mark is the name of a place known generally to the public;
- (2) The goods for which applicant seeks registration originate in the geographic place identified in the mark; and
- (3) Purchasers would be likely to believe that the goods originate in the geographic place identified in the mark.

See In re Newbridge Cutlery Co., 776 F.3d 854, 113 USPQ2d 1445, 1448-49 (Fed. Cir. 2015); *In re Societe Generale des Eaux Minerales de Vittel S.A.*, 824 F.2d 957, 3 USPQ2d 1450, 1452 (Fed. Cir. 1987); *In re Broken Arrow Beef and Provision, LLC*, 129 USPQ2d 1431, 1432 (TTAB 2019); *In re Hollywood Lawyers Online*, 110 USPQ2d 1852, 1853 (TTAB 2014).

Because Applicant is located in Corolla, North Carolina, and because Whalehead Beach is located in Corolla, the goods may be presumed to originate in Corolla and be sold at Whalehead Beach. The Board may thus further presume that purchasers will make a “goods-place” association, which satisfies the second and third prong of the test. However, as the Federal Circuit explained in *Newbridge*, this does not mean that the mark is the name of a place that is known to the public. “Prong one of the test for primarily geographically descriptive marks” must be met, *Newbridge*, 113 USPQ2d at 1451, even where “[t]here is no dispute that applicant’s goods are made in [the place named in the mark],” *id.* at 1449; *see also Broken Arrow*, 129 USPQ2d at 1444 (“[b]ecause the record does not establish the threshold element of geographic descriptiveness, we need not and do not reach the other elements”; refusal to register BA BEEF for, *inter alia*, “beef,” reversed).

In determining whether WHALEHEAD is the name of a place known generally to the public, we must first define the relevant public. As there are no limitations or restrictions of the channels of trade or classes of consumers in Applicant’s description of goods (“beer”), the relevant public is made up of ordinary adult purchasers who buy beer. *Broken Arrow*, 129 USPQ2d at 1432 (the “relevant public is the purchasing public in the United States of the types of goods identified in the involved application”) (quoting *Newbridge*, 113 USPQ2d at 1449) (cleaned up); *see also Vittel*, 3 USPQ2d at 1452 (“In dealing with all of these questions of the public’s response to word symbols, we are dealing with the supposed reactions of a segment of the American public, in this case the mill-run of cosmetics purchasers, not with the

unusually well-travelled, the aficionados of European watering places, or with computer operators checking out the meaning of strange words on NEXIS.”).

The record shows that “Whalehead Beach” is the name of a strip of beachfront property in North Carolina that boasts several rental properties in its 12-block area. There is a mansion, or former hunt club, that at least one general tourism website, the Currituck County’s Welcome Center, describes simply as “Whalehead”; other sites name the mansion the “Whalehead Club.” No industry, restaurants, breweries (other than Applicant’s, which is located in nearby Corolla) have been shown to exist in or surrounding Whalehead Beach or the Whalehead Club, but nearby wildlife habitats and a lighthouse also attract annual visitors to the beach area.

The Examining Attorney argues that the property rental websites and general tourism websites establish that “the average American beer consumer is familiar with the term WHALEHEAD as a reference to a Beach community in Corolla, North Carolina.” *Id.* Applicant takes issue with the Examining Attorney’s evidence, arguing that “vacation rental advertisements and webpages that are largely sourced from local realty businesses in surrounding towns and areas” as well as “a tourism advertisement from the local government and a visitor guide,” are “[n]otably,... not related to the relevant purchasing public [but are] targeted towards vacation renters and tourists, not beer purchasers and consumers in the alcoholic beverage industry.”

6 TTABVUE 10.

We agree with Applicant that just because the properties listed in the websites are marketed through the Internet, and not exclusively to residents of North

Carolina, WHALEHEAD has not been shown to be “the name of an area that is well known to the general purchasing public,” as the Examining Attorney contends. 8 TTABVUE 8. The advertisements submitted by the Examining Attorney are directed to purchasers of real estate property or vacation rental homes and not to consumers of beer. Further, “Whalehead” identifies both a beachfront and a specific building, refers to at least one other geographic location in the U.S., is used to refer to a type of sand dune and is the name of a wading bird. In addition, consumers unfamiliar with any of these meanings may attach to the term “whalehead” a zoological connotation referring to the head of a whale. *See, e.g., Broken Arrow*, 129 USPQ2d at 1444 (finding more than 50 different websites, articles, search results, and social media pages in which the letters BA were used to abbreviate Broken Arrow, Oklahoma, inadequate to show the “threshold element of geographic descriptiveness” had been met); *Newbridge*, 113 USPQ2d at 1451 (finding that Newbridge, Ireland, is not generally known to the relevant public “by the fact that certain maps and atlases do not include it” and by the fact that Newbridge “has other meanings, both geographical and non-geographical”).

The Examining Attorney argues that “a prima facie showing that the public would reasonably associate applicant’s goods with the geographic place named in the applied for mark is generally sufficient to support a refusal.” 8 TTABVUE 8. Even assuming that a prima facie case has been made insofar as establishing a goods-place association, the evidence fails to support a finding that the term WHALEHEAD is generally known as a geographic location. *See Broken Arrow*, 129 USPQ2d at 1433,

(finding the letters BA in the mark BA BEEF were not “the name of a place known generally to the beef-purchasing public in the United States” and declining to “separately consider whether a goods/place association exists”); *In re Trans Cont'l Records, Inc.*, 62 USPQ2d 1541, 1544 (TTAB 2002) (reversing requirement for a disclaimer of O-TOWN in the mark O-TOWN RECORDS INCORPORATED and design because the examining attorney failed to show that O-TOWN would be perceived as a geographic reference to Orlando, Florida, which made “the fact that the Examining Attorney has demonstrated a goods/place association between applicant’s goods and services and the city of Orlando, Florida . . . of no moment”).

The Examining Attorney further argues that Applicant’s disclaimer of “WHALEHEAD BREWERY” in its published, co-pending application (Serial No. 90742121) is a concession that the term is primarily geographically descriptive. However, it is well established that the Board does not take judicial notice of registrations or applications residing in the Office. *See In re Pedersen*, 109 USPQ2d 1185 (TTAB 2013); *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). Whether or not the argument is meritorious cannot be considered because the file is not in the record.

II. Conclusion

Considering the evidence as a whole, we find it fails to demonstrate that, to the relevant consumer, WHALEHEAD is a generally known geographic location.

Decision: The refusal to register Applicant’s mark WHALEHEAD BREWERY under Trademark Act Section 2(e)(2) is reversed.